Supreme Court, U. S.
FILED
AUG 26 1977
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-172

HUBERT MORELOCK, ET AL.,
Petitioners,

vs.

THE NCR CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Thomas J. Harrington, Esq.
Gordon H. Savage, Esq.
William R. Neale, Esq.
PICKREL, SCHAEFFER AND EBELING
2700 Winters Bank Tower
Dayton, Ohio 45402

and

Robert E. Signom, II, Esq.
Associate General Counsel
THE NCR CORPORATION
1700 South Patterson Boulevard
Dayton, Ohio 45479

Counsel for Respondent.

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE QUESTION PRESENTED	1
COUNTERSTATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT:	
I. There is no final appealable order.	5
II. There is no merit to a further appeal upon the same basis as other cases already before the Court	6
III. A question of substance is not presented.	7
IV. The decision of the Court is not in conflict with the other Circuits.	8
CONCLUSION	9

TABLE OF CASES

	Page
Coe v. *Armour Fertilizer Works*, 237 U.S. 413 (1915)	6
F.T.C. v. *American Tobacco Co.*, 274 U.S. 543 (1927)	7
Gulf Refining Company v. *U.S.*, 269 U.S. 125 (1925)	5
Haseltine v. *Central National Bank*, 183 U.S. 130 (1901)	6
Lorillard v. *Pons*, Case No. 76-1346, 44 U.S. L. Week 3840	6, 7, 8
Morelock et al. v. *NCR Corp.*, 546 F.2d 684, 690	5
NLRB v. *Pittsburgh SS Company*, 340 U.S. 498 (1951)	7
North Dakota State Board of Pharmacy v. *Snyders Drug Stores, Inc.*, 414 U.S. 156 (1973)	6
Rice v. *Sanger*, 144 U.S. 197 (1892)	6
Rogers v. *Exxon*, 550 F.2d 834 (3rd Cir. 1977)	8
Scofield v. *National Labor Relations Board*, 394 U.S. 423 (1969)	6
Slaken v. *O'Connor*, 278 U.S. 61 (1928)	5
Smith v. *Adams*, 130 U.S. 167 (1889)	6
U.S. v. *Krall*, 174 U.S. 385 (1899)	6
Wilson v. *Republic Iron and Steel Company*, 257 U.S. 92 (1921)	6

TABLE OF STATUTES

	Page
Labor-Management Relations Act of 1947, as amended, 29 U.S.C. Sections 141, et seq.	2
Age Discrimination in Employment Act, 29 U.S.C. Sections 626 (b) and (c)	6, 7

OTHER AUTHORITIES

Supreme Court Rule 19 (d)	5
Federal Rule of Civil Procedure 52	5, 6

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-172

HUBERT MORELOCK, ET AL.,

Petitioners,

vs.

THE NCR CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent, NCR Corporation, respectfully urges that the Petition for a Writ of Certiorari filed herein be denied.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Are the Petitioners, in a privately brought action arising under the Age Discrimination in Employment Act, entitled as a matter of right to a trial by jury?

COUNTERSTATEMENT OF THE CASE

The Petitioners are and were Development Technician employees of the Respondent, working at Respondent's Dayton, Ohio, facilities. Petitioners were initially members of a collective bargaining unit represented for purposes of collective bargaining by a labor organization pursuant to the provisions of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. Sections 141, et seq.

Initially, these Development Technician employees were in an "all employee" bargaining unit. On September 1, 1964, the National Labor Relations Board divided this "all employee" unit into two separate and distinct bargaining units — an "office and technical" employees bargaining unit, and a "production and maintenance" employees bargaining unit. Petitioners became part of the office and technical employees unit and continued to be represented by the same labor organization which had represented them prior to the establishment of the two bargaining units. As a result of the 1964 collective bargaining negotiations with this labor organization, the new vocation (a collection of related job classifications) of Development Technician was established in the collective bargaining agreement. Then, pursuant to a National Labor Relations Board election on September 10, 1971, this labor organization was decertified.

Following September 10, 1971, the employees in the office and technical employees bargaining unit were not represented by any labor organization. Respondent issued and implemented a "Handbook for Office and Technical Personnel" in place of the expired collective bargaining agreement. This Handbook contained provisions which encompassed various personnel policies applicable to Petitioners, including such items as seniority, transfer, promotion, reduction in force, recall and separation. The seniority

system provided in the Handbook was identical in terms and application to the seniority system which had evolved through negotiations during the period when office and technical employees were represented by a labor organization.

In administering this seniority system, the Respondent maintained seniority records for each employee and each job vocation within the office and technical employees unit. The employees' seniority listings were not maintained on any basis related to the age of an individual, and the age or the birth date of any individual was not recorded on the seniority listing. Clearly, the vocational seniority system was premised upon service both with the Respondent and in the vocation, and was not based on the chronological age of the individual. Neither the Development Technician vocation nor the vocational seniority system was developed with any consideration whatsoever given to the age of the employees. In point of fact, two of the Petitioners were over age 40, and three of the Petitioners were under age 40 at the time they initially entered the Development Technician job vocation, and the same mixture existed in virtually all job vocations.[1]

Under the vocational seniority system which evolved in the course of collective bargaining, and which was continued in effect after September 10, 1971, an individual did not necessarily follow the reverse course of promotion during layoff. The reason for this resulting is that a job vocation encompasses a group of job classifications. However, it is vocational seniority, irrespective of the chronological age, which determines the course of layoff.

Commencing October 13, 1972, lack of work necessitated a reduction in the total work force in the office and techni-

---

[1] The only exceptions to this were the vocations with too few employees to indicate a statistically accurate distribution.

cal employees' unit. From that date until June 26, 1973, twenty-one (21) of the Development Technician employees were laid off from that job vocation, including three (3) of the Petitioners. The work to which they were assigned was that work allowed them by their vocational seniority, and was no more or less "demeaning" than that performed by non-Petitioners. On June 26, 1973, there were six (6) individuals remaining in this job vocation. Of the twenty-one (21) individuals laid off from this job vocation, fourteen (14) were, at the time of their layoff, under age 40 and seven (7) were over the age of 40. The reductions which were occurring affected the entire work force of the Respondent's Dayton, Ohio, facilities. For example, in 1970, the total employment at the Dayton facilities was over 21,000. In 1975, at the time of trial in the District Court, there were approximately 5500 employees at the Dayton facilities.

It is likewise uncontroverted that even after these substantial reductions, there were employees both over and under the age of 40 in virtually all vocations. In June, 1973, there were 812 employees in the office and technical employees unit, 379 of whom were over the age of 40, and 433 of whom were under the age of 40. At that time, eleven (11) of the eighteen (18) employees in the Development Technician vocation were over the age of 40.

After the initial Complaint in this matter was filed in the District Court, Respondent filed a Motion to Strike Petitioners' jury demand, which was denied (Appendix E, F to Petitioners' Petition for Writ of Certiorari). Thereafter, the matter was tried to the jury, which returned a verdict for the Petitioners. Respondent filed both a Motion for Judgment *non obstante verdicto* and a Motion for a New Trial, which were granted by the District Court (Appendix C, D to the Petition). The District Court

found, as a matter of law, that no substantial evidence supported the Petitioners' position, and, therefore, granted the Judgment n.o.v. Obviously, the District Court concluded that the vocational seniority system was a *bona fide* seniority system under the Age Discrimination Employment Act. Petitioners appealed on the merits to the Sixth Circuit Court of Appeals, and Respondent cross-appealed on the issue of the Petitioners' right to a jury trial. The Sixth Circuit Court of Appeals determined that no constitutional right to a jury trial existed, and directed the District Court on remand to enter findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52 (a) (Appendix A, B to the Petition).

REASONS FOR DENYING THE WRIT

I. There is no final appealable order.

Rule 19 of this Court's Rules provides that there must be a "final appealable order" prior to invocation of a request to this Court to grant jurisdiction. As stated in *Slaken* v. *O'Connor,* 278 U.S. 61 (1928), the judgment must be final under Rule 19(d). And the face of the Order is the test of its finality, *Gulf Refining Company* v. *U.S.,* 269 U.S. 125 (1925). Specifically, in this matter, the United States Court of Appeals for the Sixth Circuit determined:

> "Accordingly, we remand this case to the District Court for findings of fact and conclusions of law in accordance with Rule 52, Fed. R. Civ. P." 546 F.2d 684, 690.

The Court further declined to decide any of the appealed issues with respect to the merits. Its footnote clearly estab-

lishes that. Also, no "perishable"[2] constitutional issue is involved as a jury trial was already had and Judgment n.o.v. issued. Hence, a reversal and remand does not create a final appealable order.

An order remanding a case for findings of fact and conclusions of law is not a final order because the Record is incomplete until the District Court provides compliance with Rule 52 as directed. Furthermore, there has been no final decision on the merits by the Sixth Circuit. *Wilson* v. *Republic Iron and Steel Company,* 257 U.S. 92 (1921); *U.S.* v. *Krall,* 174 U.S. 385 (1899); *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413 (1915); *Haseltine* v. *Central National Bank,* 183 U.S. 130 (1901); *Smith* v. *Adams,* 130 U.S. 167 (1889); *Rice* v. *Sanger,* 144 U.S. 197 (1892); *Scofield* v. *National Labor Relations Board,* 394 U.S. 423 (1969).

II. There is no merit to a further appeal upon the same basis as other cases already before the Court.

This Court has granted certiorari in *Lorillard* v. *Pons.*[3] The Brief requesting the writ of certiorari in the *Lorillard* case stated that the courts throughout the land were awaiting determination of the jury trial issues with respect to the Age Discrimination in Employment Act, 29 U.S.C. Section 626 (b) and (c). In addition, it was asserted that the *Lorillard* case was in conflict with the decision of the Sixth Circuit Court of Appeals in the instant matter with respect

[2] See, *North Dakota State Board of Pharmacy* v. *Snyders Drug Stores, Inc.,* 414 U.S. 156 (1973).

[3] Case No. 76-1346, certiorari granted on June 27, 1977, 44 U.S. L. Week 3840.

to the jury trial issue. It is a traditional basis of the discretionary writ of certiorari that the Court decide issues of particular substance only once. As this Court stated in *NLRB* v. *Pittsburgh SS Company,* 340 U.S. 498, 502 (1951):

> "Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrasing conflict of opinion and authority between the Circuit Courts of Appeal.'"

The issues involved herein, in accordance with the request for certiorari made by Petitioners, deal solely with a jury trial under the Age Discrimination in Employment Act, 29 U.S.C. Section 626 (b) and (c). Hence, because the issue is better presented in the *Lorillard* case, there is no necessity in granting a second writ in this case.

III. A question of substance is not presented.

Basically, this Court cannot reach the merits of this case insofar as who wins and who loses. The case was tried to a jury before the District Court, and the jury verdict issued for Petitioners. However, the District Court granted Judgment n.o.v. and entered judgment on behalf of Respondent. The Sixth Circuit Court of Appeals sustained the Respondent's cross-appeal on the issue of the trial by jury and did not consider the merits of this case. Therefore, the substantial issue of who wins and loses and assessment of evidence is not before the Court. *NLRB* v. *Pittsburgh SS Company, supra*; *F.T.C.* v. *American Tobacco Co.,* 274 U.S. 543 (1927).

Whether the Petitioners are entitled to a trial by jury is not relevant to the ultimate outcome of this case. Hence,

issuance of the writ of certiorari herein will be a futile act insofar as the resolution of the merits of this case.

IV. The decision of the Court is not in conflict with the other Circuits.

Because the District Court in this matter tried the case to a jury, it is submited that the decision by the Fourth Circuit Court of Appeals in *Lorillard* v. *Pons* where a jury trial was denied is opposite. This case was decided upon a Judgment n.o.v. and, thus, is not contrary to the *Lorillard* decision.

Similarly, there is no conflict with *Rogers* v. *Exxon,* 550 F.2d 834 (3rd Cir. 1977), as that case dealt with a pension plan as opposed to a seniority system, and was remanded for deletion of the "pain and suffering" issues given to the jury which is the very issue Petitioners seek to tack to their jury issue before this Court. There is no conflict as neither the Sixth nor the Third Circuits allow such consequential damages under violation of the Age Discrimination in Employment Act.

CONCLUSION

For the reasons set forth above, Respondent requests that this Court deny the Petitioners' Petition for a Writ of Certiorai to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

Thomas J. Harrington, Esq.
Gordon H. Savage, Esq.
William R. Neale, Esq.

PICKREL, SCHAEFFER AND EBELING

2700 Winters Bank Tower
Dayton, Ohio 45402

and

Robert E. Signom, II, Esq.
Associate General Counsel

THE NCR CORPORATION
1700 South Patterson Boulevard
Dayton, Ohio 45479